

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
September 14, 2006 Session

**MILDRED ELAINE MILLER v. JAY HILL DAVIDSON**

**Appeal from the Chancery Court for Maury County**  
**No. 98-431     Jim T. Hamilton, Judge**

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**No. M2006-00099-COA-R3-CV - Filed on October 5, 2006**

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This appeal involves a former husband's efforts to stop making monthly payments to his former wife as required by their marital dissolution agreement. Seven years after the divorce, the former husband filed a petition in the Chancery Court for Maury County claiming that these payments were alimony and that he was no longer required to pay them because his former wife had married again. Following a bench trial, the trial court concluded that the disputed payments were alimony payments even though the parties' marital dissolution agreement had characterized them as part of the division of the marital estate. Accordingly, the trial court held that the former husband was no longer required to make the monthly payments to his former wife. The former wife has appealed. We have determined that the trial court erred by classifying the disputed payments as alimony and by relieving the husband of his obligation to continue paying them.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed**

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

L. Bruce Peden, Columbia, Tennessee, for the appellant, Mildred Elaine Miller.

Larry Samuel Patterson Jr., Columbia, Tennessee, for the appellee, Jay Hill Davidson.

**OPINION**

**I.**

Jay Davidson and Elaine Davidson were married in May 1987 in Maury County. It was Ms. Davidson's fourth marriage, and Mr. Davidson's second. This marriage also failed, and the parties were divorced on July 28, 1998 in the Chancery Court for Maury County. The divorce decree approved and incorporated a marital dissolution agreement executed by the parties on July 4, 1998.

Like most marital dissolution agreements, the parties' agreement contained provisions regarding the division of the parties' marital estate and their other financial obligations. Under the

agreement, Ms. Davidson received the marital residence on Pamela Drive and assumed the remaining mortgage debt on the residence. The parties also expressly waived any claim or right to alimony. In addition, the agreement contained the following provision that is at issue on this appeal:

As a further division of marital assets, Husband agrees to pay to Wife the sum of Six Hundred Dollars (\$600.00) per month for fourteen (14) years commencing when the Husband relocates from the marital residence on or before ninety (90) days from the execution hereof as forth hereinabove, same to be payable on the 1st of each month for a period of one hundred sixty-eight months (168) months.

Mr. Davidson moved out of the marital residence and began making the required \$600 monthly payments in a timely fashion.

Mr. Davidson married again. In 2001, Mr. Davidson and his new wife purchased the Pamela Drive residence from Ms. Davidson. Ms. Davidson used the proceeds from the sale of the Pamela Drive residence to purchase a new residence on Maple Court. As part of this transaction, Mr. Davidson and his new wife and Ms. Davidson signed an agreement on June 30, 2001 that, among other things, addressed the \$600 per month payments the marital dissolution agreement required Mr. Davidson to make to Ms. Davidson.

The June 30, 2001 agreement was apparently prepared without the assistance of counsel, and its provisions are somewhat obtuse. Construed reasonably, it contains three obligations. First, the agreement limited Mr. Davidson's liability with regard to the Maple Court residence by requiring Ms. Davidson to pay the difference between her monthly house note for the Maple Court residence and the \$600 monthly payments she was receiving from Mr. Davidson. Second, it required Mr. Davidson to pay for an insurance policy on his life that would be used to discharge his financial obligations to Ms. Davidson in the event that he died before his obligation under the marital dissolution agreement was fully paid. Third, it gave Mr. Davidson the option of continuing to make the \$600 per month payments to Ms. Davidson beyond the period required by the marital dissolution agreement and provided that if he did, he and his new wife would acquire a two-thirds interest in the Maple Court residence. The agreement also provided that "[a]fter 08/01/2012<sup>1</sup> or whenever the loan on the property (Lot #11 Maple Court) is paid in full, the MDA (Marital Dissolution Agreement) will be considered to be paid in full thus ceasing the \$600.00 payments."

Following the execution of the June 30, 2001 agreement, Mr. Davidson continued to pay \$600 per month to Ms. Davidson for approximately four years. Ms. Davidson married again on June 24, 2005 and changed her surname to "Miller."<sup>2</sup> On July 19, 2005, soon after learning of the marriage, Mr. Davidson filed a petition in the Chancery Court for Maury County seeking to be

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<sup>1</sup>This is the date of the last \$600 payment required by the marital dissolution agreement.

<sup>2</sup>Henceforth, we will refer to Ms. Davidson as Ms. Miller.

relieved of his obligation to pay Ms. Miller \$600 per month until August 2012. Despite the fact that the marital dissolution agreement characterized these payments as part of the division of the parties' marital assets, Mr. Davidson insisted that these payments were alimony and that Tenn. Code Ann. § 36-5-121(f)(3) (2005)<sup>3</sup> provided grounds for discontinuing them.

The trial court heard Mr. Davidson's petition without a jury on September 16, 2005. On December 1, 2005, the court filed an order concluding that the \$600 payments had actually been alimony in solido and that the June 30, 2001 agreement transformed them into alimony in futuro. Accordingly, the court concluded that Ms. Miller's marriage in June 2005 ended Mr. Davidson's obligation to make the \$600 per month payments. Ms. Miller has appealed from this order.

## II.

The standards this court uses to review the results of bench trials are well-settled. With regard to a trial court's findings of fact, we will review the record de novo and will presume that the findings of fact are correct "unless the preponderance of the evidence is otherwise." We will also give great weight to a trial court's factual findings that rest on determinations of credibility. *In re Estate of Walton*, 950 S.W.2d 956, 959 (Tenn. 1997); *B & G Constr., Inc. v. Polk*, 37 S.W.3d 462, 465 (Tenn. Ct. App. 2000). If, however, the trial court has not made a specific finding of fact on a particular matter, we will review the record to determine where the preponderance of the evidence lies without employing a presumption of correctness. *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997).

The presumption of correctness in Tenn. R. App. P. 13(d) applies only to findings of fact, not to conclusions of law. Accordingly, appellate courts review a trial court's resolution of legal issues without a presumption of correctness and reach their own independent conclusions regarding these issues. *Johnson v. Johnson*, 37 S.W.3d 892, 894 (Tenn. 2001); *Nutt v. Champion Int'l Corp.*, 980 S.W.2d 365, 367 (Tenn. 1998); *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 60 S.W.3d 65, 71 (Tenn. Ct. App. 2001); *Placencia v. Placencia*, 48 S.W.3d 732, 734 (Tenn. Ct. App. 2000).

Issues involving the construction of a written contract involve questions of law. *Guiliano v. CLEO, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999); *Nat'l Ins. Ass'n v. Simpson*, 155 S.W.3d 134, 138 (Tenn. Ct. App. 2004). Therefore, a trial court's construction of a written contract is not entitled to a presumption of correctness on appeal. *State ex rel. Pope v. U.S. Fire Ins. Co.*, 145 S.W.3d 529, 533 (Tenn. 2004); *Angus v. Western Heritage Ins. Co.*, 48 S.W.3d 728, 730 (Tenn. Ct. App. 2000). Accordingly, reviewing courts must review a trial court's construction of a contract de novo and must make their own determination regarding its meaning and legal import. *Hamblen County v. City of Morristown*, 656 S.W.2d 331, 335-36 (Tenn. 1983); *Hillsboro Plaza Enters. v. Moon*, 860 S.W.2d 45, 47 (Tenn. Ct. App. 1993).

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<sup>3</sup>Mr. Davidson's petition erroneously referred to Tenn. Code Ann. § 36-5-101 as the basis for his claim that he was no longer required to make the disputed payments because of Ms. Miller's marriage. This provision was recodified on July 1, 2005 as Tenn. Code Ann. § 36-5-121(f)(3).

### III.

Ms. Miller insists that the trial court erred by treating Mr. Davidson's monthly payments as alimony that was subject to be terminated under Tenn. Code Ann. § 36-5-121(f)(3). For his part, Mr. Davidson asserts that the payments under the marital dissolution agreement were alimony in solido even though they were characterized as part of the division of the parties marital property. Mr. Davidson also asserts that even if the \$600 monthly payments were not originally alimony in solido, they became alimony in futuro as a result of the June 30, 2001 agreement. Ms. Miller has the better of both arguments.

The trial court's characterization of the \$600 monthly payments as alimony in solido is clearly at odds with the plain terms of the marital dissolution agreement and the conduct of the parties. The parties expressly waived any claims for alimony and characterized the \$600 monthly payments as part of the division of their marital property. Based on their mutual understanding that the payments represented a division of property, neither Ms. Miller nor Mr. Davidson treated the payments as alimony for federal income tax purposes.<sup>4</sup> The marital dissolution agreement is clear on its face and requires no construction.<sup>5</sup> Because there is no statutory prohibition against effecting a division of marital property by requiring one party to make periodic cash payments to the other, *see Sellers v. Sellers*, No. E2005-02867-COA-R3-CV, 2006 WL 2567517, at \*1-2, 6 (Tenn. Ct. App. Sept. 7, 2006); *Noble v. Stubblefield*, 755 S.W.2d 454, 458 (Tenn. Ct. App. 1988), we conclude that the trial court erred as a matter of law when it construed the \$600 monthly payment as alimony in solido.

Mr. Davidson points to the provision in the marital dissolution agreement permitting the parties to modify or waive any of the provisions in the agreement. He argues that the parties could, by agreement, change the character of the \$600 monthly payments from a division of marital property to alimony and that the parties did just that in their June 30, 2001 agreement. We disagree for two reasons. First, the parties do not have the authority to alter the legal classification of the transactions or undertakings in a marital dissolution agreement once they have been approved by the trial court. This is solely the prerogative of the court. Second, the parties' June 30, 2001 agreement does not alter the legal classification of the \$600 monthly payments, and no provision in the June 30, 2001 agreement can reasonably be construed as a waiver of Ms. Miller's right to continue to receive \$600 per month from Mr. Davidson until August 2012.

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<sup>4</sup>Ms. Miller never reported the payments as income, and Mr. Davidson never sought a tax deduction for the payments. While not dispositive, evidence regarding how the parties treated payments for tax purposes is relevant. *See Church v. Church*, No. M2004-02702-COA-R3-CV, 2006 WL 2168271, at \*8 (Tenn. Ct. App. Aug. 1, 2006).

<sup>5</sup>None of the issues in Ms. Miller's brief are specifically directed at the trial court's decision to permit Mr. Davidson to testify about the parties' reasons for characterizing the \$600 monthly payments as part of the division of marital property rather than as alimony. Even though Ms. Miller takes issue with this ruling in the argument section of her brief, it would have been better practice to include a separate issue directly concerning the trial court's evidentiary ruling. In light of our determination that the marital dissolution agreement is unambiguous, we require no additional evidence, parol or otherwise, to help us understand the legal import of the disputed portion of the marital dissolution agreement.

Tenn. Code Ann. § 36-5-121(f)(3), which requires the termination of alimony upon the marriage of a former spouse, applies only to alimony in futuro. Mr. Davidson's obligation to pay Ms. Miller \$600 per month until August 2012 was not alimony in futuro when the parties were divorced and did not somehow become alimony in futuro after the parties signed their June 30, 2001 agreement. Accordingly, the trial court erred when it invoked Tenn. Code Ann. § 36-5-121(f)(3) as a basis for excusing Mr. Davidson of his legal obligation to pay Ms. Miller \$600 per month as required by the marital dissolution agreement.<sup>6</sup>

#### IV.

As a final matter, Ms. Miller asserts that she is entitled to a judgment for the attorney's fees she incurred both in the trial court and on appeal. Because Tennessee recognizes and follows the American Rule with regard to the payment of attorney's fees, Ms. Miller remains responsible for her own attorney's fees unless she can point to a statute, contract, or other recognized equitable principle permitting her to shift the costs of her legal representation to Mr. Davidson. *See Taylor v. Fezell*, 158 S.W.3d 352, 359 (Tenn. 2005); *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 194 (Tenn. 2000); *Fossett v. Gray*, 173 S.W.3d 742, 752 (Tenn. Ct. App. 2004).

Ms. Miller bases her request for attorney's fees on Paragraph 13 of the Marital Dissolution Agreement which states:

Should either party incur any expense or legal fees as a result of breach of any portion of this Agreement by the other party, the Court shall award reasonable attorney's fees and suit expenses to the non-defaulting party which are reasonably incurred. No breach, waiver or default of any of the terms of this Agreement shall constitute a waiver of any subsequent breach or default of any of the terms of this Agreement.

This provision plainly allocates the obligation to pay legal expenses to the party who breaches the marital dissolution agreement. In light of our conclusion that Mr. Davidson breached the agreement by discontinuing his \$600 payments to Ms. Miller, we find that Ms. Miller is entitled to recover her attorney's fees and legal expenses both in the trial court and this court. Accordingly, on remand, the trial court is directed to hold a hearing to ascertain the amount of Ms. Miller's reasonable attorney's fees and legal expenses and to enter a judgment for Ms. Miller and against Mr. Davidson for that amount.

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<sup>6</sup>We would reach the same conclusion had either Mr. Davidson or the trial court attempted to characterize the \$600 monthly payments as transitional alimony. While transitional alimony does not automatically terminate upon remarriage, the parties may agree that it will and may also agree to preserve their right to otherwise modify its terms. Tenn. Code Ann. § 36-5-121(g)(2)(A), -121(g)(4). We find no evidence in this record that Mr. Davidson and Ms. Miller agreed that Mr. Davidson would no longer be required to make the \$600 monthly payments to Ms. Miller if she remarried.

**V.**

We reverse the order relieving Mr. Davidson of his obligation under the marital dissolution agreement to pay Ms. Miller \$600 per month for fourteen years. The case is remanded to the trial court with directions (1) to calculate Mr. Davidson's current arrearage and to enter an order directing Mr. Davidson to pay this arrearage forthwith, (2) to direct Mr. Davidson to immediately resume making the \$600 monthly payments to Ms. Miller required under the parties' marital dissolution agreement, and (3) to award Ms. Miller her reasonable attorney's fees and expenses for the proceedings both in the trial court and in this court. We tax the costs of this appeal to Jay Hill Davidson for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., P.J., M.S.